No. 92-1107

Supreme Court, U.S.
FILED
JAN 21 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

STEWART ARTHUR HOLMES, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY GULF COAST MARINE CERTIFICATE NO. 11877, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; RONALD MALCOLM PATEMAN, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:50/85/1, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; AND SEUMUS IAIN COWLEY, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:M822/85, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER,

Petitioners,

vs.

MR. AND MRS. ALBERT TAYLOR, JR.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in the absence of any entrenched federal precedent in General Maritime Law, the Court of Appeals properly reversed the District Court's summary judgment, and remanded this action with instructions to determine whether punitive damages are insurable under the applicable state law.

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STEWART ARTHUR HOLMES, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY GULF COAST MARINE CERTIFICATE NO. 11877, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; RONALD MALCOLM PATEMAN, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:50/85/1, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; AND SEUMUS IAIN COWLEY, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:M822/85, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER,

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RESPONDENTS' BRIEF IN OPPOSITION

FACTUAL CHRONOLOGY

The salient facts which should ultimately determine the outcome of this dispute predate the casualty in which Albert Taylor, Jr. was critically injured and nearly drowned on October 16, 1985.

At the time of this casualty, the vessel DMC-1 was owned by Diamond M. Construction Company and operated under bareboat charter to Petitioners' insured. The vessel charter required that Drynorth (USA), Inc. obtain insurance covering the vessel's operation and use. Accordingly, the Petitioners' insured purchased coverage, including protection and indemnity, umbrella, and comprehensive general liability policies. Drynorth (USA), Inc.'s insurance was placed through RISC, Inc. of Houston, Texas. The Comprehensive General Liability policy (Certificate No. 22191) in question was prepared, then issued and dated at Houston, Texas on April 8, 1985.[1] The "general insuring conditions" of Petitioners' Comprehensive General Liability policy issued to Drynorth (USA), Inc. in the State of Texas provides that "the company [Petitioners] will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage."

Together with the Comprehensive General Liability policy (Certificate No. 22191), RISC, Inc. simultaneously placed excess

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1. Certificate No. 22191 was formulated by Petitioners using the standard CGL policy form (form 6395A) with the "watercraft exclusion" deleted by special endorsement (endorsement no. 9).

Gulf Coast Marine "Excess Maritime Liability" policy (Gulf Coast Marine Certificate No. 11877) which Respondent also maintained provides coverage for punitive damages, was prepared and issued to Petitioners' insured at New Orleans, Louisiana.

umbrella insurance for Petitioners' insured in the London market. By explicit endorsement, the excess umbrella coverage purchased and delivered to Petitioners' insured in Texas along with the other policies placed through RISC, Inc. set forth a specific exclusion of coverage for punitive damages.

The referenced policies, including Petitioners' Comprehensive General Liability policy, remained in force and effect on October 16, 1985. Mr. Taylor's personal injury action arose out of the operation and use of the watercraft chartered by Petitioners' insured. In the underlying personal injury action, the District Court entered a single money judgment against Drynorth (USA), Inc. The District Court's judgment stated the sum which Petitioners' insured had become legally obligated to pay as damages in Mr. Taylor's personal injury action. Drynorth (USA), Inc.'s appeal from the personal injury judgment was dismissed by the Fifth Circuit. Subsequently Petitioners' insolvent insured sought no further review. On this basis, the Taylors initiated this declaratory judgment action seeking payment of the referenced judgment according to the insuring conditions of the policies issued to Petitioners' insured.

REASONS FOR DENYING THE WRIT

There is no valid reason for the Court to grant this Petition for Certiorari and the petition sets forth none. This case involves the application of the analysis stated in *Wilburn Boat Company v. Fireman's Fund Insurance Company*, 348 U.S. 310; 75 S. Ct. 368, 99 L. Ed. 337 (1955) and most recently applied in *Albany Insurance Co. v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 279, 116 L. Ed. 2d 231 (1991).

Petitioners' position and the District Court's decision below are unsupported by any decision of this Court concerning marine insurance. Moreover, the insurability of punitive damages is not precluded by any federal admiralty precedent among the Courts of Appeal or any United States District Court decision which predates the issuance of the subject comprehensive general liability policy. Consistent with the reasoning of both *Wilburn Boat* and general maritime law choice of law principles, the Court of Appeals below reversed the District Court's deicision. *See Taylor v. Lloyds Underwriters of London*, 972 F.2d 666, *reh. en banc denied*, 978 F.2d 713 (5th Cir. 1992).

The decision of the Court of Appeals is not in conflict with any other Federal Court decision regarding the application of *Wilburn Boat* in the context of marine insurance policy construction where no "entrenched federal precedent" of general maritime law controls the disputed issue. In the absence of any conflict among the Circuits, this decision of the Court of Appeals preserves the uniformity of the general maritime law and further upholds the consistency and confidence with which the general maritime law of marine insurance is applied throughout our judicial system.

The Court of Appeals recognized and held that, in the absence of controlling general maritime case law, federal courts sitting in admiralty may look to the appropriate state law in determining the

rules under which marine insurance policies shall be interpreted. Consistent with prior jurisprudence and Constitutional authority, the decision of the Court of Appeals below preserves the interests of uniformity in general maritime law, promotes continuity between marine and land-based insurance practice, and thus fosters confidence among maritime actors.

Petitioners' comprehensive general liability policy (Certificate 22191) in question covered both land-based and maritime risks. The subject comprehensive general liability policy was issued and delivered at Houston, Texas to Petitioners' insured, Drynorth (USA), Inc., a Texas corporation. For well over a decade prior to Petitioners' issuance of the subject policy. Texas courts have recognized the insurability of punitive damages.[2] Consequently, because there existed no public policy bar to the insurability of punitive damages under the *non-maritime* coverages of Petitioners' comprehensive general liability policy, contingent upon the construction of the "insuring conditions" and applicable exclusions, punitive damages would be covered. However, irrespective of how clearly the parties may express their affirmative intent to insure punitive damages in a single comprehensive general liability policy (such as Certificate 22191), Petitioners insist that land-based punitive damages would be insured while punitive damages deemed to arise under general maritime law would not. The blatant inconsistency of the nonsensical result urged by Petitioners offends the integrity of maritime law.

Texas law had long recognized the insurability of punitive damages and Petitioners had issued and delivered the subject

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2. *Dairyland County Mutual Insurance Company v. Wallgren*, 477 S. W. 2d 341 (Tex. Civ. App. 1972); and *Home Indemnity Company v. Tyler*, 522 S. W. 2d 594 (Tex. Civ. App. 1975).

comprehensive general liability policy in Texas *prior to* a contrary decision by *any* Federal admiralty court. Upon this backdrop, the Fifth Circuit's observations in *Albany Insurance Company v. Anh Thi Kieu* cite are particularly appropriate:

> Texas has a strong interest in the protection of its citizens, including Anh Thi Kieu, against the overbearing tactics of insurance underwriters.[3]

In light of this legitimate and important state interest, the *Albany Insurance* Court further reasoned that:

> The application of unfamiliar federal maritime rules engenders undesirable uncertainty among maritime actors; this Court can easily avoid such uncertainty by the application of "already well-developed state laws."[4]

Therefore, the decision by the Court of Appeals in the case *sub judice* fosters confidence among the parties to marine insurance contracts by achieving continuity between marine and land-based insurance policy construction.

As observed by Petitioners, "the right to recover punitive damages in admiralty law had its origins in federal maritime law as early as 1818." It was therefore foreseeable by Petitioners *prior to the issuance and delivery of the subject comprehensive general liability policy*, that covered operations may lead to the imposition of punitive damages. As is certainly true in the London insurance

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3. *Albany Insurance Company v. Anh Thi Kieu*, 927 F.2d 882, 891 (5th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 279, 116 L. Ed. 2d 231 (1991).

4. *Albany Insurance v. Anh Thi Kieu*, 927 F.2d 882, 888 (5th Cir. 1991).

market, "scriveners of insurance policies are acutely aware of the meaning and effect of the language."[5] As evidenced by the terms of the excess umbrella policy issued to Petitioners' insured, by explicit endorsement, underwriters in the London market know precisely how to exclude coverage for punitive damages.

It behooves underwriters to make coverage exclusions clear and unmistakable. This axiom has been consistently recognized in insurance practice and the case law of this Court for over one hundred years.[6] According to specific and controlling rules of marine insurance interpretation, the insurer must bear "the burden of proving non-coverage under the exclusions in the policy," and therefore "the insurer must, at its peril, make the policy exclusions clear and unmistakable. Otherwise, as here, there is coverage." *See Home Benefit Association v. Sargent*, 142 U.S. 691, 12 S. Ct. 332 (1892); *Mayronne Mud & Chemical v. T-W Drilling Company*, 168 F. Supp. 800 (E.D. La. 1958); Buglass, *Maritime Insurance and the General Average in the United States*, (2nd Cir. Edition, 1981), at page 86.

The decision of the Court of Appeals below neither offends the characteristic features of the general maritime law nor interferes with the proper harmony and uniformity of general maritime law in its international and interstate relations. As in the great majority of jurisdictions in the United States, there is no public policy against allowing insurance coverage against punitive damages in either Texas or Louisiana. See Schumaier & McKinsey, *The Insurability of Punitive Damages*, 72 ABA Journal 68 (March 1, 1986).

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5. *See Eagle Leasing Corporation v. Hartford Fire Insurance Company*, 540 F.2d 1257 (5th Cir. 1976), *cert. denied*, 431 U.S. 967, 97 S. Ct. 2926, 53 L. Ed. 2d 1063 (1977).

6. *See Home Benefit Association v. Sargent*, 142 U.S. 691, 12 S. Ct. 332 (1892).

Historically, state law has played a particularly central role in marine insurance relationships. As emphasized by the Fifth Circuit in *Albany Insurance*, this flows primarily from the recognition that, through experience, "states are far better equipped to balance the risks that each party to an insurance contract endures."[7] The modern rule adopted by the majority of states allowing the insurability of punitive damages as a feature of private contract has worked effectively in the land-based insurance industry. Absent "entrenched federal precedent," Petitioners' stance demands that this Court inject a severe limitation on the contractual freedoms of insurers and their insureds. Petitioners cite no feature unique to maritime law that warrants such a constriction of contractual rights.

Instead, Petitioners present their "horrible scenario" which, in reality, exposes the fallacy of Petitioners' contentions. Petitioners erroneously maintain that according to Fifth Circuit's decision in the instant case, "a vessel insurer's potential liability will change every time the vessel moves through the waters of a different state" and "the outcome of lawsuits applying general maritime law [will] be determined by the fortuity of the state next to which an ocean-going or river vessel is located at the time of collision or accident."[8] In order to imagine their "horrible scenario," Petitioners necessarily must have closed their eyes to controlling general maritime law choice of law rules. In *Eagle Leasing Company v. Hartford Fire Insurance Company*, 540 F.2d 1257 (5th Cir. 1976), *cert. denied*, 431 U.S. 967, 97 S. Ct. 2926, 53 L. Ed. 1063 (1977), the Fifth Circuit applied Missouri law to the interpretation of a marine insurance policy issued and delivered in St. Louis.

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7. *Albany Insurance Company v. Anh Thi Kieu*, 927 F.2d at page 887.

8. Petitioners' "Petition for a Writ of Certiorari," at page 7.

Notwithstanding the vessel casualty's fortuitous occurence in the Gulf of Mexico off the coast of Galveston, Texas, the Fifth Circuit in *Eagle Leasing* applied Missouri law as required pursuant to maritime choice of law rules. Likewise, in *Albany Insurance Company v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 279, 116 L. Ed. 2d 231 (1991), the Fifth Circuit stated:

> The court in maritime cases *must* apply general federal maritime choice of law rules. In this case, we *must* consider the choice of law rules which specifically govern marine insurance disputes.

Albany Insurance Company v. Anh Thi Kleu, 927 F.2d 882, 890 (5th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 279, 116 L. Ed. 2d 231 (1991) (emphasis added).

In *Albany Insurance*, the Fifth Circuit concluded that, in the context of a marine insurance dispute where there is no entrenched federal precedent, the state or states in which the policy was formed, issued, and delivered determines which states "have sufficient contact with the policy and the parties that their laws *can* be applied."[9] Of these "eligible" states, "the court must then determine which state has the greatest interest in the resolution of the issues."[10] Accordingly, the certainty and confidence instilled by the choice of law rules which specifically govern marine insurance disputes completely dispel the "horror" of the examples envisioned by Petitioners. Under Federal general maritime law

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9. *Albany Insurance Company v. Anh Thi Kieu*, 927 F.2d 882, 891 (5th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 279, 116 L. Ed. 2d 231 (1991).

10. *Id., citing Truehart v. Blandon*, 884 F.2d 223, 226 (5th Cir. 1989).

choice of law rules, the state or states whose laws may apply absent "specifically controlling federal authority" is determined at the issuance and delivery of the insurance policy. Irrespective of where a maritime casualty may occur, this choice of law analysis under general maritime law remains constant as the insured vessel moves through the waters of different states.

In several instances since 1955, this Honorable Court has declined to revisit *Wilburn Boat Company v. Fireman's Fund Insurance Company*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955). At this juncture, there is neither need nor reason to revisit or overturn the *Wilburn Boat* decision. The thin criticisms of the Fifth Circuit's decision in *Taylor* have been raised before this Court on past occasions. This Honorable Court has consistently denied certiorari where language and analysis identical to that cited by the *Taylor* court has been employed. In *Eagle Leasing v. Hartford Fire Insurance Company*, 540 F.2d 1257 (5th Cir. 1976), *cert. denied*, 431 U.S. 967, 97 S. Ct. 2926, 53 L. Ed. 2d 1063 (1977), the Honorable Judge John Minor Wisdom, who authored the *McNulty*, decision relied upon by Petitioners, stated:

> In the absence of specifically controlling federal authority, the law of the state where a marine insurance contract is issued and delivered governs the construction of its language.[11]

Earlier, in *Irwin v. Eaglestar Insurance Company*, 455 F.2d 827 (5th Cir. 1972), *cert. denied*, 409 U.S. 118, 93 S. Ct. 118, 34 L. Ed. 95 (1972), the Fifth Circuit panel, which again included the Honorable Judge Wisdom, echoed Justice Harlan's observation

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11. *Eagle Leasing Corporation v. Hartford Fire Insurance Company*, 540 F.2d 1257, 1261 (5th Cir. 1976).

that "the application of state law in [*Wilburn Boat*] was justified by the Court on the basis of a lack of any provision of maritime law governing the matter there presented."[12] More recently, in *Ingersoll-Rand Financial Corp. v. Employers Insurance of Wausau*, 771 F.2d 910 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1263, 89 L. Ed. 2d 573 (1986), and *Albany Insurance Company v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 279, 116 L. Ed. 2d 231 (1991), certiorari was denied where the language of the Fifth Circuit's analysis mirrored the *Taylor* decision. Petitioners present no new reason why *Wilburn Boat* should be revisited. Rather, the position taken by Petitioners would indeed serve to undermine the public confidence in the marine insurance industry by driving an unjustifiable wedge between marine and land-based insurance policy interpretation.

Finally, Petitioners erroneously maintain that the Ninth Circuit's holding in *Bohemia, Inc. v. Home Insurance Company*, 725 F.2d 506 (9th Cir. 1984), is at odds with the Fifth Circuit's decision in *Taylor*. A simple comparison of the *Taylor* and *Bohemia* decisions reveals their dispositive distinctions and conclusively establishes the inaccuracy of Petitioners' position. Based on an "exhaustive review" of the pertinent case law, the Ninth Circuit affirmed the District Court's application of the federal maritime rule governing the policy provisions at issue in *Bohemia*. Once the *Bohemia* court identified such a controlling admiralty rule, the Ninth Circuit's further exposition concerning what may have happened in lieu of such "entrenched federal precedent" definitively exemplifies judicial dicta. In contrast to *Bohemia*, the Fifth Circuit in *Taylor* specifically determined and explained in detail that there was no entrenched maritime precedent specifically on point. Accordingly, there is no conflict whatsoever between *Bohemia* and the outcome reached by the Court of Appeals in the

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12. *Irwin v. Eaglestar Insurance Company*, 455 F.2d 827, 829 (5th Cir. 1972).

case sub judice. Petitioners' claim of conflict between the Circuits is entirely unfounded.

CONCLUSION

In lieu of any conflict among the Circuits or insult to the constitutionally-protected doctrine of general maritime law uniformity, and in the absence of contrary entrenched federal precendent, this Honorable Court is respectfully urged to deny this Petition for Writ of Certiorari.

Respectfully submitted,

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